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OF THE United States.

OCTOBER TERM, 1902.

No. 139.

THE DETROIT, FORT WAYNE and BELLE ISLE RAILWAY,

Plaintiff in Error,

vs.

CHASE S. OSBORN, Commissioner of Railroads,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

On Clark Avenue, in the city of Detroit, Michigan, there is now and has been since 1881, a crossing caused by the intersection of tracks belonging to certain steam railroad companies and the tracks of Plaintiff in Error, a street railroad company. Ten years thereafter both corporations had double

tracks at this crossing, and, somewhat later, a third track for switching purposes was extended across the highway, at the point in question, by said railway companies. On these tracks at said crossing, in the year 1900, thirty-eight passenger trains passed each day, and on the street railway tracks electric cars passed every few minutes. Nineteen years after the first crossing was made, and nine years after the construction of double tracks by both corporations, the defendant in error, Commissioner of Railroads of the State of Michigan, was asked by the common council of the city of Detroit to order additional protection to said crossing, it having become a most dangerous one by reason of the great growth in population of the city of Detroit.

The defendant in error, on the 7th of March, 1902, acting under authority of an act passed by the legislature of the state of Michigan in the year 1893, entitled "An act to regulate the construction of the tracks of railroads and street railroads across each other, and the stringing of wires, electric or other, over railroad tracks, and relative to the maintenance of such tracks, heretofore so constructed, and wires heretofore so strung," did, after a personal inspection of the premises aforesaid, and after hearing representations of the city officials of the city of Detroit, and after giving notice to the Plaintiff in Error and the Union Terminal Association, the owner of the railroad tracks, and a hearing had, in which Plaintiff in Error participated, and after due deliberation, decide, that the public interest required such additional pratection at the crossing, and thereupon did order that there should be constructed, and thereafter operated and maintained, safety gates and de-

railing and signaling appliances, to be operated day and night by a watchman from a tower, and that the cost and expense of the construction, maintenance and operation of the said gates, tower and derailing and signaling appliances, should be born by the Union Terminal Association, and the Detroit, Fort Wayne and Belle Isle Railway Company, Plaintiff in Error, equally, share and share alike.

On April 2, 1900, Plaintiff in Error filed its petition in the Supreme Court of the State of Michigan, for the purpose of obtaining a writ of mandamus, and compel the vacation of the order aforesaid, in so far as it compelled it to share or bear any of the expense of constructing and maintaining the safety appliances mentioned in said order. After a most careful consideration, the Supreme Court of the State of Michigan refused to issue the writ prayed for, and maintained the order of the commissioner, and the statute on which it was based, as a legitimate exercise of the police power of the state. Thereafter, Plaintiff in Error sued out a writ of error and the case is now here for final determination.

ARGUMENT.

I.

THE RECORD IN THIS CASE PRESENTS NO FEDERAL QUESTION.

Since filing in this court our brief in support of this proposition, we have received the brief of Plaintiff in Error. After examination of same we are convinced that our position is right. To the authorities heretofore cited by us we add:

New Orleans Water Works Co. vs. State of Louisiana,

decided by this court last May, and reported in 185 U. S., page 356.

This case settles the principle that in order to warrant the exercise of jurisdiction by this court over the judgments of state courts there must be something more than a mere claim that a Federal question exists; there must, in addition to the simple setting up of the claim, be some color therefor, or in other words, the claim must be of such a character that its mere mention does not show it destitute of merit. There must be some fair ground for asserting its existence, and in the absence thereof, a writ of error will be dismissed, although the claim of a Federal question was plainly set up.

After citing former decisions, this Court says:

> "These cases show the rule and its limitations, and where, by the record, it appears that although a claim of a Federal question has been plainly made, if it also clearly appear that it lacked all color of merit, and had no substance or foundation, the mere fact that it was raised was not sufficient to give this court jurisdiction."

It has been our claim from the beginning and is now, that an examination of the questions submitted by the Plaintiff in Error, in the light of these decisions, will show that there is no foundation for the claim that there are Federal questions in the case. The mere mention of them shows that they are destitute of merit.

The claim of Plaintiff in Error is this: The statute under consideration is silent as to notice. The order of the Railroad Commissioner as to how the costs of the construction and maintenance of the safety gates for the protection of the public

at the crossing in question shall be born, may be made without notice to the parties in interest and giving them an opportunity to be heard. For that reason the order of the Commissioner is void, and the statute itself unconstitutional. The Supreme Court of Michigan, having sustained both the order, and the statute based thereon, as a lawful exercise of the police power of the state, a Federal question is presented because such order and opinion deprives Plaintiff in Error of property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States.

Plaintiff in Error cites authorities, and could have cited many more, to sustain the proposition that want of notice, in many cases, confers no jurisdiction, and, therefore, all subsequent proceedings are void, and a Federal question is raised where the state courts have sustained an act, and proceedings had thereunder, which results in a tax, assessment, servitude or other burden being imposed upon property for the public use, whether it be for the whole state, or of some more limited portion thereof, where no notice has been given to the persons whose property may be taken, and no opportunity is given them, *at any stage of the proceedings*, to contest the charge thus sought to be imposed.

But the entire claim of Plaintiff in Error is groundless, and the authorities cited have no application whatever to this case, for the simple reason that no tax, assessment, servitude or any burden whatsoever can be imposed on any property of Plaintiff in Error by any order that the Railroad Commissioner could make.

It has not been, and cannot at any time in the future, be

deprived of any of its property by the order made by the Commissioner in this case.

The Plaintiff in Error has the legal right to disobey, as it has, the order of the Commissioner. The only result of such disobedience is, that it becomes liable to pay a penalty as provided in Section 7 of said act, which reads as follows:

"It shall be the duty of every corporation and person to whom an order made by the Commissioner of Railroads under this Act shall be directed, to comply with such order in accordance with its terms, and for any neglect to so comply therewith any such corporation or person shall be liable to a penalty of one hundred dollars and to a like penalty for every ten days during which said neglect shall continue. Any such penalty may be recovered in an action of assumpsit brought in the name of the people of this State, and it shall be the duty of the prosecuting attorney of the proper county to bring any such action at the request of the Commissioner of Railroads."

In such action of assumpsit it is open to Plaintiff in Error to defend on any ground that it may see fit, and can there urge that the Commissioner had no jurisdiction to make the order, because the statute makes no provision as to notice.

Therefore, this case is ruled by the principle of law declared by this court in

Davidson vs. Board of Administrators of New Orleans, 96 U. S., p. 105.

"That whenever by the laws of a State, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of

the whole State, or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

The language of Mr. Justice Field, in declaring the opinion of this court in

Hagar vs. Reclamation Dist. No. 108, 111 U. S., 711,

applies with full force to this case. He says:

"This decision (Davidson vs. New Orleans) covers the case at bar. The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defense going either to its validity or amount, could be pleaded.* * * Assessments in California, for the purpose of reclaiming overflowed and swamped lands, can be enforced only by suits, and, of course, to their validity it is essential that notice be given to the tax-payer, and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances. If property taken upon an assessment, which can only be enforced in this way, be not taken by due process of law, then, as said by Mr. Justice Miller, in the New Orleans case, these words, as used in the constitution, can have no definite meaning. The numerous decisions cited by counsel, some of which are given in the note, as to the necessity of notice, and of an opportunity of being heard, are all satisfied where a hearing in court is thus allowed."

That this rule is the settled law of the land is shown by

reference to the twelve pages of notes and citations to the leading case of Davidson vs. New Orleans, in Vol. 9 of Notes on United States Reports by Rose, pages 376-388.

The whole argument of counsel for Plaintiff in Error proceeds on an imaginary statement of facts to the effect that by the statute of Michigan the Railroad Commissioner is authorized without notice, and without any opportunity given for a hearing, at any stage of the proceedings, to arbitrarily impose the costs of the safety gates on Plaintiff in Error, and that the payment for the same shall be made within a certain number of days, and that the order shall be a lien on its property, which can be enforced by sale in default of payment, whereas the real facts are, that the Railroad Commissioner has no such power, and no property of Plaintiff in Error can be taken until it has had its day in court, and a full opportunity given it of making any defense it may have. Therefore, the claim that any Federal question exists in this record is so clearly without color of foundation, that the court is without jurisdiction in this case, and for that reason the writ of error should be dismissed.

II.

WAIVER OF NOTICE BY APPEARANCE.

"The object of notice being to give persons interested an opportunity to be present and protect their rights, it follows that a failure to give notice, or any irregularity in giving it, is waived, if the person entitled to notice appear and take part in the proceedings in the matter or matters concerning which they are required to be notified."

Lewis on Eminent Domain, Vol. 2, Sec. 379.

The author, in a note, cites sixty-five decisions in support of the above proposition, among which are the following Michigan cases:

East Saginaw & St. Clair R. R. Co. vs. Benham, 28 Mich., 459.

Dunning vs. Drain Commissioner, 44 Mich., 519.

Soller vs. Township of Brown, 67 Mich., 422.

The first two cases were decided by Judge Cooley. In delivering the opinion of the court he said:

In the first case, which involved proceedings to condemn land for the use of the railroad: "The want of publication of notice to owners and parties interested cannot be insisted upon on appeal, where all concerned have voluntarily appeared in the cause."

In the second case, which involved proceedings to lay out a township drain, he said:

"It appears from the return that plaintiff in *certiorari* had actual notice and took part in the proceedings before and at the time when the jury was struck. There is no reason to suppose he was taken by surprise in any of the proceedings. We are not inclined to reverse such proceedings, except for very substantial cause, and the present case, in our opinion, does not call for our intervention."

In the third case, proceedings were had to lay out a highway through the lands of the plaintiff in error. In this case it was decided that although the Commissioner's return of his proceedings failed to show that he met those interested at the place specified in his notice, it appearing, from the affidavit of

the plaintiff in error, that at the time and place specified in said notice, he and others did appear, in fact, and did meet the Commissioner for the purpose of being heard in opposition to the proceedings to establish such highway, he cannot complain of the omission in the commissioner's return.

Many other Michigan cases could be cited which follow the principle announced by the great judge above named, that want of notice can be waived by voluntary appearance.

There was such a voluntary appearance by plaintiff in error in this case. This fact affirmatively appears in its amended petition, page 14 of record, in which these words are found:

"Your petitioner respectfully shows that it has been served with a certified copy of an order made by Chase S. Osborn, Commissioner of Railroads of the State of Michigan, a copy of which order and certificate is hereto attached, and made a part of this petition, and marked 'Exhibit A'; *that notice was given by respondent to relator and the Union Terminal Association, and a hearing had, at which relator's representative objected to the making of said order.*"

Because of its voluntary appearance and taking part in the proceedings had, before the Commissioner, in response to a notice given it by him, plaintiff in error is not in a position to urge the point that the statute dees not require notice, admitting purely for the sake of argument that such notice is required.

III.

NO NOTICE IS REQUIRED IN PROCEEDINGS OF THIS CHARACTER.

Section 5 of the Act is the one complained of by counsel for plaintiff in error. It reads as follows:

"The Commissioner of Railroads shall, as soon as possible after the passage of this Act, examine the crossings of the tracks of railroads and street railroads then existing, and order such changes made in the manner of such crossings, or such safeguards for protection against accidents to be provided thereat, as in his judgment ought to be so made or provided; and shall apportion any expense incident thereto between the companies affected as he may deem just and reasonable."

They say that, by this section of the statute, the whole matter is left to the arbitrary action and independent investigation of the Railroad Commissioner, not only on the question of the necessity for the installation of safety devices, but also as to the distribution between the two companies of the cost of installing, maintaining and operating such safety appliances, and they advance the following proposition:

"It is the well settled law that where the public officer is given authority to determine that certain things should be done in the interest of public safety, and if the officer is given the further authority to impose the cost thereof upon certain individuals who are bound by his action, the matter is *quasi* judicial in its character, and if the law does not in express terms, or by necessary implication arising from the language of the Act itself, grant to the party against whom the judgment is rendered the right to a hearing before condemnation, such a proceeding and judgment amounts to a deprivation of property without due process of law within the meaning of the constitutional provision."

The direct and simple answer to this proposition is this: It has no application whatever to the facts of this case. The sole purpose of the Act, and of this particular section, is pro-

tection of life. It is the exercise by the legislature of a governmental power and duty, under the police power of the state, to secure a safe highway. In no such case can it be claimed, by railroad companies, and other corporations invested with the power of eminent domain, that they are deprived of property, without due process of law, by a statute, under which the result is ascertained in a mode suited to the nature of the case.

It is a simple elemental proposition that such corporations may be compelled to adopt such appliances and make such additions, or changes, in their works or property, and take such precautions as are necessary to the public safety.

The principle for which we contend in this division of our brief, is established by the decision of this court in

New York & New England R. R. Co. vs. Bristol,
151 U. S., 566,

to which we referred in our former brief. In this case Mr. Chief Justice Fuller refers to and adopts the reasoning of two Connecticut cases, in the following language:

"In Woodruff vs. Catlin, the court, speaking through Pardee, J., said in reference to a similar statute: 'The Act, in scope and purpose, concerns protection of life. Neither in intent nor in fact does it increase or diminish the assets either of the city or of the railroad corporations. It is the exercise of the governmental power and duty to secure a safe highway. The legislature having determined that the intersection of two railways, with a highway, in the City of Hartford, at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out

new highways and new railways over such land and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone or in part by both; and may enforce obedience to its judgment. That the legislature of this state has the power to do all this, for the specified purpose, and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue."

"And as to this Act, the court, in 58 Conn., 532, on this company's appeal, held that grade crossings were in the nature of nuisances which it was competent for the legislature to cause to be abated, and that it could, in its discretion, require any party responsible for the creation of the evil, in the discharge of what were in a sense governmental duties, to pay any part, or all, of the expense of such abatement."

The title of the case, reported in 58 Conn., *supra*, is the New York and New England Railroad Company's appeal from Railroad Commissioners. The counsel for the said company raised the same point that is raised by counsel for plaintiff in error in this case. The legislature of Connecticut had passed a law declaring that no matter what the facts and circumstances of a given case, the town should only bear one-fourth of the expense of making certain alterations in crossings when the public safety so required; the remaining three-fourths to be imposed upon the railroad company. Counsel for the railroad, in his brief, says:

"It is not due process of law to afford to parties a hearing before a proper tribunal, but to fetter this tribunal with an arbitrary rule forbidding it to apply the law of the land, or

any rules of distributive justice in the case these would affect one of the parties more than a certain extent. For this reason it is respectfully submitted, that the provisions of the Act of 1889 concerning the apportionment of expense in the class of cases to which the present one belongs, render the proceedings in this case unconstitutional and void, under both the constitution of this state, and the constitution of the United States."

The answer of the court to this objection, and its opinion, is as follows:

"The sole question in the case is, whether that portion of the act which limits the sum to be apportioned to the town to one-fourth of the whole expense is unconstitutional. This, it is claimed, is not due process, inasmuch as it may prohibit the commissioners from requiring of the town its just and fair proportion of the whole expense.

"If the legislature should require the division of joint property between two persons equally interested in such a manner as to give one three-fourths and the other but one-fourth, it would be indefensible, being against natural right, and not due process of law. So, too, of a statute that should attempt to compel one of two joint obligors, jointly and equally interested, to assume the whole obligation as between themselves. But the case before us is not a case in which the legislature is attempting to apportion joint property or a joint contract obligation between the parties, but is a case of curing an evil where both parties, in some measure, but in different degrees, are responsible for the evil. If two jointly commit a tort, whereby another is injured, the law will compel either party to pay the whole damage; and ordinarily no contribution is allowable. This case is somewhat analogous; but we do not place our decision on that ground. Two parties are engaged in legitimate business; both supply public wants, and

both, in some sense, discharge governmental duties. Both furnish ways to facilitate public travel. The way of each crosses that of the other at grade, and more or less danger unavoidedly attends their use. As the use increases, the danger increases. The policy of the state now is to abolish these grade crossings as rapidly as can be reasonably done. Legislation on this subject assumes that each party, in the discharge of its duty, is concerned in creating the danger, and that each may justly be required to contribute to the expense of its removal; or that either may be required to pay the whole; and if each contributes, that the proportion which each shall pay may be determined by the legislature, in each case as it arises, or by a general rule; by itself, or by a delegation of its power to the railroad commissioners. This exercise of power is justifiable on the ground that government itself, in the discharge of its governmental duties, undertakes to remove the danger; and does it in the same manner, and through the same instrumentalities, that it provides and maintains highways through and at the expense of towns and other corporations. So far as towns are concerned, it is a duty that has ever devolved upon them to keep the highways reasonably safe. They are compelled to act without compensation or pecuniary profit. Their sole motive is the public welfare. Railroad companies, in some sense, are but the agents of the government in affording to the public a more expeditious and vastly improved method of travel. As a compensation for their capital and labor invested they are permitted, as turnpike companies formerly were, to charge the public for the use of their ways. Unlike towns they do not act upon compulsion, but by choice. Their motive is a private gain; public benefit is incidental. Advantage to the public is a reason for granting the franchise; but the enterprise itself is essentially a private one. They contribute

largely to the danger, and the state may well require them to contribute largely to its removal. * * *

"We think it is competent for the statute to cause them to be abated, and that it may require any party responsible for their existence to pay any part or all of the expense. That being so, requiring the railroad company to pay three-fourths of the expense, however just it might be to require the town to pay more than one-fourth, is not a matter of which the railroad company can legally complain. The statute may operate harshly, as all statutes are liable to in certain cases, but it is not unconstitutional."

Counsel for plaintiff in error, on page 38 of their brief, say :

"Why the court did not consider the point (the statute not providing for notice) in the opinions filed, does not appear, but it is quite evident that it was overlooked."

Instead of casting this reflection on the Supreme Court of Michigan, it would be in accordance with all legal presumptions that the court paid no attention to the point because they regarded it, under the particular facts of this case, of no importance. We think that we have conclusively established that the whole argument of plaintiff in error, on the subject of notice, rests on no legal foundation when applied to the facts of this case.

IV.

On page 16 of their brief, counsel for plaintiff in error say:

"The legislature has not the power under the constitu-

tion to authorize the Railroad Commissioner to impose the cost of maintaining and operating safety devices and appliances upon the street railway company, under the facts and circumstances in this case, for the reason :

"1st. That it, in terms, imposes an additional burden and attaches an additional substantial condition to the right of the street railway to occupy the street and to operate its cars thereon.

"2nd. The attempt to fix upon the street railway company, which is simply a user of the highway in common with the general public, the cost of installing, maintaining and operating devices intended for the protection of the whole public using the highway, is an unjust discrimination, and is a denial of the equal protection of the law to the street railway company."

They cite no authority to support either of these propositions, and we are certain none can be found. But an examination of the record will disclose the fact that the question of user embraced therein was regarded by the court below, *as the question in the case*, and that one of its members, Mr. Justice Grant, did sustain counsel in their claim that no part of the necessary cost of the construction and maintenance of the safety gates could be legally imposed on plaintiff in error, for this reason:

"The street railway is a proper, legitimate and necessary use of the public highway. It is not an additional burden to that of the easement the general public has in the street. It is but one of many users of such highway, (therefore) it cannot be made subject to conditions other than those to which the general public is subject in traveling over such highways. Wherein (he asks) is the logic of compelling one user of the

public highway to pay the whole, or part of the expense, in protecting all users of the highway against the dangers incident to the passage of long, swift and ponderous trains of steam cars."

In a single word his argument is, "You can't legally impose a burden on a street railway company, which cannot lay its tracks in the streets of a city without first—and as a condition precedent thereto—having obtained the express permission of the proper authorities of said city, that you cannot lay on a private citizen, who happens to own a carriage, and has occasion to daily drive over this particular highway, or a grocer who uses heavy wagons in the conduct of his business.

The bare statement of the proposition contains its own refutation. And yet counsel for plaintiff in error not only seriously urge this as law, but insist that because the majority of the court rejected it, it results in such an unjust discrimination that their company is denied the equal protection of the law guaranteed by the constitution of the United States. And here again, they say, a Federal question is raised.

The simple and direct answer to the entire argument of both judge and counsel is this: While all private citizens can walk, ride or drive, at their free will and pleasure, over such highway, at any time and for any purpose, if a street railway corporation should attempt to so use the highway, without first having obtained the express consent of the proper public authorities, it would be a trespasser on such highway and could be proceeded against as such.

This is such an elementary proposition, and the distinc-

tion is so simple and so well defined, that it is useless to extend this argument by long citations from the authorities. (23 Am. & Eng. Encyc. of Law, page 946 and authorities there cited.)

The private citizen can use the highway without a license from the public authorities. The corporation that wishes to use the street to make money, for itself, by such use, must obtain such license. The price, in part, that it pays for the use of the street is the money that it may spend in the construction and maintenance of safety gates.

All private users simply pass and re-pass over the surface of the highway, but a street railway company takes possession of it. It lays its iron or steel rails in its soil. To all intents and purposes it owns the parts embraced within its tracks. All other users must give way to its cars. Its business is affected with the public interests, and is of such a character that it must be controlled by the public authorities, in so far as the public safety is endangered by its operation. It receives valuable franchises from the public, but written into every charter, every contract, every franchise, by force of law, is this principle: Every such charter, contract or franchise is granted or made by the public authorities, and received and entered into by the company with the express condition that it will always submit to, obey and carry out every police regulation which said public authorities shall then, or at any time in the future, deem necessary to protect the lives of the people and secure the safety of the public.

It is for this simple reason that when, by the growth of the city, or the erection of buildings at a certain point

therein, a crossing made by the tracks of street and railway corporations becomes dangerous, the public authorities have the right to so declare it; to order the construction of safety gates, and to impose the cost of their construction and maintenance upon the corporations which caused the danger in such proportion as they deem reasonable and just.

The whole question, then, as to whether a street railway company is or is not an additional servitude on the public highway, is absolutely immaterial and irrelevant to this case. The majority of the Michigan supreme court decided that it was not, the court using these words:

"Though the decisions are not uniform it may be considered as now settled by the great weight of authority that the use of a street by a street railway company, under proper regulations, even though it use electricity as a motive power, is not an improper use of the street, and is not such an additional burden as to entitle the adjacent proprietor to additional compensation."

But the court say: "It does not follow, however, from these decisions that the electric car does not increase the danger to those who have a right to travel the streets. If it be asserted that the propulsion of a modern suburban car, forty-five or fifty feet long, which may be propelled at the will of the motor-man, at a speed from simply moving to forty or fifty miles an hour, through the public streets of a city, is not a different use of the street and a source of greater danger to the public than obtained when the streets were used only by pedestrians and carriages drawn by horses, such an assertion would not commend itself to the common sense of those having cognizance of the facts. The long list of frightful injuries and fatal casualties which occur yearly because of the new methods of travel, in all our large cities, would be a complete answer to the assertion. Does it not follow, then, that though

the modern methods of travel are required by the conditions of modern life, that inasmuch as they may and do increase the danger to human life, that it is entirely competent for the state in its efforts to protect its citizens in the exercise of its police power to provide such regulations, at the expense of the persons or corporations employing the new methods, as in its wisdom it deems necessary to accomplish that purpose. It seems to us there can be but one answer to this question. New dangers upon the public streets require new safeguards in the interest of the safety of the public. It is a matter of common knowledge that where electric cars run at frequent intervals, across a railroad over which trains are frequently run, that it is a place of unusual danger, not only to the passengers in the steam cars, but also to the passengers in the electric cars. This danger is occasioned not by the steam road alone, nor by the electric road alone, but by both of them. We have no doubt that under such circumstances the State, in the exercise of its police power, can take such steps as will minimize the danger and can impose the expense of doing so upon the corporations causing the danger."

In no event does the question of additional servitude, upon which courts and judges have so divided, present a Federal question for the consideration of this court. If the question were here for discussion we certainly would take issue with counsel for plaintiff in error when they say their road is a street railway, pure and simple. We should insist that an examination of the various statutes of Michigan, under which plaintiff in error is organized and operated, the manner in which the defendant's road is constructed, the fact that it runs from the city into the country and its mode of use, as authorized by statute, makes it a commercial road rather than an ordinary street railway, and, therefore, it does become an additional servitude upon the public highway. That the rule of no additional servitude is restricted to the case where the

road, of the street railroad company is within the corporate limits of a city, and used solely for carrying passengers. We content ourselves with a simple reference to said statutes and certain decisions.

1. An Act to provide for the construction of tram railways, 1855. C. L. of 1897, page 2027.

2. Act 35, page 46, S. L. 1867. C. L. 1897, Vol. 2, page 2037.

3. C. L. of 1897, Sec. 13, page 2040, and Section 34, page 2041. In said last question these words are found:

> "They may do a suburban express business and may carry farm produce, garden truck, milk, merchandise and other like freight for twelve hours of each day without any restriction."

Taylor vs. Bay City Street Ry. Co., 80 Mich. 77.

Detroit City Ry. vs. Mills, 85 Mich. 634.

Nichols vs. Ry. Co., 87 Mich. 361.

Booth on Street Railway Law, §§54, 222 and 231.

Hannah vs. Street Ry. Co., 81 Mo., App. Rep., 78, (1899.)

Southern Ry. Co. vs. Atlanta Ry. & Power Co., 111 Ga., 679; (51 L. R. A., 125).

LaCrosse City Ry. Co. vs. Higbee, 51 L. R. A., 923.

V.

Counsel for plaintiff in error insist that the order of the Railroad Commissioner in terms imposes an additional burden and attaches an additional substantial condition to the right of the street railway to occupy the street, and to operate its cars thereon.

As counsel for plaintiff in error have cited no authority in support of this proposition, it seems entirely unnecessary to cite many authorities to show that this proposition is not true in law, and that this order of the Railroad Commissioner is a simple and just exercise of the police power of the state, delegated to him by the legislature. We content ourselves with a few quotations from a few text writers on the subject.

The subjection of existing corporations to new police regulations does not involve a repeal or amendment of the charters, for an act of incorporation simply guarantees to the incorporators the right to act and do business as a corporate body, subject of course to the laws of the land, and the legitimate control of government. Over the railway as a highway, and all its public relations, the state, by virtue of its legislative power has supervision and control."

Tiedman Lim. of Police Power, Sec's 179, 194.

"As applied to it, the police power is the continuing and paramount authority of the legislature, within its constitutional prerogatives, and of municipal corporations, under their delegated powers, to establish regulations which promote the public welfare and require it to do whatever is required for the health, safety and welfare of the people."

Booth's Street Railway Law, 220–226.

"Every special charter is granted and accepted, subject to such police regulations, as to the exercise of granted powers, as the legislature may establish. The whole subject matter is regulated by the legislature. The general police power of the state resides in the legislature. It can forbid grade crossings of highways by railroads or of one railroad by another at any particular place. It can, by the same authority, permit them at any particular place conditionally or unconditionally."

"The passing of an ordinance granting consent to an electric street railway to operate its cars upon the streets of the city does not divest the city of this power. It may so

regulate their use by such companies as may be most consistent with the safety of the general public from accidents and injury."

Joyce on Electric Law, Sec. 477.

See also Elliott's Roads and Streets, 2nd Ed. Sec. 459.

VI.

The last proposition which counsel for plaintiff in error make is stated, in different forms, in different parts of their brief, but the point is this: That the railroad seeking an intersection must make compensation for all damages and loss that may result therefrom. That where one railroad intersects another the former must make compensation, and likewise where a railroad is built over a highway, or where a highway is built over a railroad, that the junior road must pay all the expenses of putting the highway in a safe condition, and erecting and maintaining such safeguards as are required for the protection of travelers upon the street, or highway, as well as those who are traveling upon the steam cars. They claim that the *doctrine of priority of location* is well recognized in Michigan and other jurisdictions. According to this doctrine the junior railroad is responsible for the danger at the crossing at Clark Avenue, because before it was constructed there was no crossing and consequently no danger there.

The whole claim of counsel for plaintiff in error on this branch of the case can be reduced to this simple proposition: That the Union Terminal Association Railway Company must not only bear all of the expense of the construction of the

safety gates, but for all time thereafter must bear all of the expense of their maintenance because the first track of plaintiff in error was laid in Clark Avenue a year and a half before it was crossed by a single railroad track. Certainly no authority can be found to sustain such a proposition, when embraced in the statement of facts are added these facts: That at the time of the first crossing the territory was but sparsely settled and was in the suburbs of the City of Detroit; that nearly twenty years elapsed after such first crossing was made before the order was made, and that in the meantime, from a single track on which small cars were drawn by horses, the business of the street railway company had become so transformed that double tracks were laid and great cars, propelled by electricity, passed at the crossing every few moments of the day and night, and that the city had grown out to and embraced this point.

We said in the court below, and say now, that the Supreme Court of Michigan has never decided, nor any other court that we have any knowledge of, that where the necessity of safety appliances is created, some fifteen or twenty years after the crossing is first made, solely in consequence of changed circumstances and conditions, resulting from the growth of the surrounding territory, the road whose tracks were first laid shall be exempt from the burden of assisting in constructing, and forever exempt from the expense of maintaining safety appliances made necessary by such changed conditions.

The rule is settled in Michigan that for all injuries to its track, right of way, and franchise, occasioned by the crossing,

and which may be properly regarded *as the natural, necessary and approximate cause thereof*, the railroad whose track is crossed is entitled to receive damages, and whenever a jury at the time of the proposed crossing shall determine as a matter of fact that the erection and maintenance of gates, and the employment of flagmen *is an immediate necessity*—the necessity created at once and by the very fact of the construction of the crossing, then, and in such case, the expense thereof may also be considered by them as an element of damage. But the Supreme Court of that state has just as clearly stated that this in no wise "interferes with the police power conferred upon the Railroad Commissioner to interfere in behalf of the State, when such crossing shall become dangerous, by reason of the frequency of travel along the highway. "Contingent future disadvantages and the possibility that sometime in the future gates may be required for the safety of the public are never considered as elements of damage in proceedings to condemn lands for railway purposes, or in any of the questions which arise when crossings are made.

City of Grand Rapids vs. Bennett, 106 Mich., 528; and other Michigan cases cited therein.

Old Colony etc. R. R. Co. vs. Inhabitants of Plymouth Co., 14 Gray, 155;

Searle vs. R. R. Co., 33 Pa. St., 57;

Peoria etc. Co. vs. Peoria and Farmington Co., 105 Ills., 110.

Chicago etc. R. Co. vs. Joliet etc. R. Co., 105 Ills., 388.

Com'r of Parks & Boulevards vs. Mich. Cent. R. R. Co., 90 Mich., 385.

Com'r of Parks & Boulevards vs. The Chicago and Canada Grand Trunk R. R. Co., 91 Mich., 292.

F. & P. M. R. R. R. Co. vs. D. & B. C. R. R. Co., 64 Mich., 370.

People vs. D. G. R. & M. R. R. Co., 79 Mich., 474.

N. Y. & N. E. R. R. Co. vs. Bristol, 151 U. S., 556.

C. & N. W. Ry. Co. vs. Chicago, 140 Ills., 317.

Charlotte R. R. Co. vs. Gibbs, 142 U. S., 386.

Railroad Co. vs. St. Ry. Co., 89 Maine, 328.

Fitchburg R. R. Co. vs. Grand Junction Co., 4 Allen, 198.

Pittsburg R. R. vs. S. W. Pa. Ry. Co., 77 Pa. St. 173.

State vs. W., St. L. & Pac., 83 Mo., 144.

The decisions of this court in the cases just cited by us conclusively establish the right and the power of a state to pass such a statute as the one under review in this case. They hold that it is entirely competent for the legislature to require of corporations every reasonable and expedient change in the method of operating their roads and conducting their business, which may be necessary to promote the security, convenience and comfort of the public, and that the expense may be imposed on the corporations owning and operating such roads within the state. Such statutes are not in conflict with any provision of the Federal constitution. Being the recipient of special privileges from the state to be exercised in the interest of the

public, and voluntarily assuming the obligations thus mentioned, their business to the extent that it is affected with a public use is subject to legislative discretion, and in the discretion of the legislature all of this power may be exercised through a commissioner, or commissioners, specially appointed for that purpose.

We regard it as entirely unnecessary to longer continue this discussion. We insist that there are no Federal questions in this case. That there is no merit in any of the questions raised by counsel for plaintiff in error, and that the judgment of the court below, assuming the existence of Federal questions, should be affirmed, because said judgment was right and in exact accordance with the law of the land.

Very respectfully,

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